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INTRODUCTION

Jane was a forty–year–old drug addict from rural Kentucky. She had two children under the age of ten and one son, John, who was twenty. Jane had suffered severe brain trauma and was declared to be in persistent vegetative state by the time she was transferred from her regional hospital to the University of Kentucky Chandler Medical Center. John knew his mother would not have wanted to live like this, and after applying substituted judgment, requested that life–sustaining treatment be withdrawn. There was only one problem. Jane was six weeks pregnant, and under Kentucky law, even if Jane had expressly written out what her wishes were, once she had come to lack decisional capacity, such a directive is deemed ineffective in the instance of a pregnant woman. As a result, Jane was kept alive for thirty–six weeks so that the fetus could be brought to term.[2]

Beginning with the landmark New Jersey Supreme Court case, *In re Quinlan*, state courts have generally held that incompetent individuals may, through substituted judgment, decline unwanted medical treatment.[3] These state court decisions culminated in the 1990 Supreme Court decision, *Cruzan v. Director, Missouri Department of Health*, wherein the Court, in a 5–4 decision, held it was permissible for a state trial court to require clear and convincing evidence of a patient's wishes before life–sustaining treatment could be withdrawn from an incompetent person.[4]

Post–*Quinlan*, as state courts began recognizing the right of an incompetent to withdraw life–sustaining treatment through their

1 J.D. expected, May 2012, University of Kentucky College of Law; B.A. in Political Science, *summa cum laude*, May 2009, Eastern Kentucky University. The author would like to thank Professor Nicole Huberfeld for her guidance and helpful insight on living will and advance directive acts.

2 Dr. Sara Rozenthal, Dir., Univ. of Ky. Program for Bioethics and Patients' Rights, Speech to Professor Nicole Huberfeld's Fall 2010 Bioethical Issues in the Law Class (Nov. 16, 2010) (transcript on file with author).

3 *See In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976).

4 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 284 (1990).

surrogates, and even more so after the Supreme Court's decision in *Cruzan*, state legislatures began enacting living will or advance directive acts which allow individuals to spell out exactly what their wishes are if they are ever to be found in an incompetent state.[5] Currently, all fifty states and the District of Columbia have enacted living will or advance directive acts in some form.[6] Of these fifty-one jurisdictions, only fifteen are silent as to the effectiveness of such provisions if a patient is found to be pregnant.[7]

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5 *See* Timothy J. Burch, *Incubator or Individual?: The Legal and Policy Deficiencies of Pregnancy Clauses in Living Will and Advance Health Care Directive Statutes*, 54 MD. L. REV. 528, 531-32 (1995).

6 *See* ALA. CODE §§ 22-8A-1 to 22-8A-14 (LexisNexis 2006); ALASKA STAT. §§ 13.52.010 to 13.52.395 (2010); ARIZ. REV. STAT. ANN. §§ 36-3201 to 36-3297 (2009); ARK. CODE ANN. §§ 20-17-201 to 20-17-218 (2005); CAL. PROB. CODE §§ 4670 to 4701(West 2009); COLO. REV. STAT. §§ 15-18-101 to 15-18-113 (2010); CONN. GEN. STAT. ANN. §§ 19a-570 to 19a-580g (West 2010); DEL. CODE ANN. tit. 16, §§ 2501 to 2518 (2003 & Supp. 2010); D.C. CODE §§ 7-601 to 7-630 (LexisNexis 2008); FLA. STAT. ANN. §§ 765.101 to 765.404 (West 2010); GA. CODE ANN. §§ 31-32-1 to 31-32-14 (2009); HAW. REV. STAT. §§ 327E-1 to 327E-16 (Supp. 2007); IDAHO CODE ANN. §§ 39-4501 to 39-4515 (2011); 755 ILL. COMP. STAT. 35/1 to 35/10 (West 2007); IND. CODE ANN. §§ 16-36-4-1 to 16-36-4-21 (LexisNexis 1993 & Supp. 2009); IOWA CODE ANN. §§ 144A.1 to 144A.12 (West 2005 & Supp. 2011); KAN. STAT. ANN. §§ 65-28,101 to 65-28,109 (2002); KY. REV. STAT. ANN. §§ 311.621 to 311.643 (West 2011); LA. REV. STAT. ANN. §§ 40:1299.58.1 to 40:1299.58.10 (2008); ME. REV. STAT. ANN. tit. 18-A, §§ 5-802 to 5-817 (1998 & Supp. 2010); MD. CODE ANN., HEALTH-GEN. §§ 5-601 to 5-618 (LexisNexis 2009); MASS. GEN. LAWS ANN. ch. 201D, §§ 1 to 17 (West 1994); MICH. COMP. LAWS ANN. §§ 700.5501 to 700.5520 (West 2002 & Supp. 2011); MINN. STAT. ANN. §§ 145B.01 to 145B.17 (West 2011); MISS. CODE ANN. §§ 41-41-201 to 41-41-229 (West 2007); MO. ANN. STAT. §§ 459.010 to 459.055 (West 2007); MONT. CODE ANN. §§ 50-9-101 to 50-9-206 (2009); NEB. REV. STAT. §§ 20-401 to 20-416 (2007); NEV. REV. STAT. §§ 449.535 to 449.690 (2009); N.H. REV. STAT. ANN. 137-J:1 to 137-J:23 (LexisNexis Supp. 2010); N.J. STAT. ANN. §§ 26:2H-53 to 26:2H-78 (West 2007); N.M. STAT. ANN. §§ 24-7A-1 to 24-7A-17 (LexisNexis Supp. 2009); N.Y. PUB. HEALTH LAW §§ 2980 to 2994 (McKinney 2007); N.C. GEN. STAT. §§ 90-320 to 90-323 (2009); N.D. CENT. CODE §§ 23-06.5-01 to 23-06.5-18 (2002); OHIO REV. CODE ANN. §§ 2133.01 to 2133.15 (LexisNexis 2007); OKLA. STAT. ANN. tit. 63, §§ 3101.1 to 3101.16 (West Supp. 2011); OR. REV. STAT. §§ 127.505 to 127.660, 127.995 (2009); 20 PA. CONS. STAT. ANN. §§ 5401 to 5416 (West 2005 & Supp. 2011); R.I. GEN. LAWS §§ 23-4.11-1 to 23-4.11-15 (2008); S.C. CODE ANN. §§ 44-77-10 to 44-77-160 (2002); S.D. CODIFIED LAWS §§ 34-12D-1 to 34-12D-22 (1994); TENN. CODE ANN. §§ 32-11-101 to 32-11-113 (2007); TEX. HEALTH & SAFETY CODE ANN. §§ 166.031 to 166.053 (West 2010); UTAH CODE ANN. §§ 75-2a-101 to 75-2a-125 (LexisNexis Supp. 2009); VT. STAT. ANN. tit.18, §§ 9700 to 9720 (Supp. 2010); VA. CODE ANN. §§ 54.1-2981 to 54.1-2993 (2009); WASH. REV. CODE §§ 70.122.010 to 70.122.920 (2008); W. VA. CODE ANN. §§ 16-30-1 to 16-30-13 (LexisNexis 2011); WIS. STAT. ANN. §§ 154.01 to 154.30 (West Supp. 2010); WYO. STAT. ANN. §§ 35-22-401 to 35-22-416 (Supp. 2011).

7 *See* CAL. PROB. CODE §§ 4670 to 4701(West 2009); D.C. CODE §§ 7-621 to 7-630 (LexisNexis 2008); HAW. REV. STAT. §§ 327E-1 to 327E-16 (Supp. 2007); LA. REV. STAT. ANN. §§ 40:1299.58.1 to 40:1299.58.10 (2008); ME. REV. STAT. ANN. tit. 18-A, §§ 5-802 to 5-817 (1998 & Supp. 2010); MASS. GEN. LAWS ANN. ch. 201D, §§ 1 to 17 (West 1994); MISS. CODE ANN. §§ 41-41-209 to 41-41-229 (West 2007); N.M. STAT. ANN. §§ 24-7A-1 to 24-7A-17 (LexisNexis Supp. 2009); N.Y. PUB. HEALTH LAW §§ 2980 to 2994 (McKinney 2007); N.C. GEN. STAT. §§ 90-320 to 90-323 (2009); OR. REV. STAT. §§ 127.505 to 127.660, 127.995 (2009); TENN. CODE ANN. §§ 32-11-101 to 32-11-113 (2007); VA. CODE ANN. §§ 54.1-2981 to 54.1-2993 (2009); W.

Twelve states completely stay the effectiveness of a living will or directive in the instance of a pregnant woman,[8] twelve stay the living will or directive if a fetus is viable or live birth would be possible with continued life-sustaining treatment,[9] and five do so unless life-sustaining treatment would not have the effect of allowing the fetus to continue to live birth, such treatment would be physically harmful to the woman, or such action would prolong severe pain which cannot be alleviated with medication.[10] Five of the remaining seven jurisdictions leave the determination as to the effectiveness of a directive in a pregnancy scenario completely to the discretion of the female patient,[11] while the last two jurisdictions impose a rebuttable presumption that a female patient would not want life-sustaining treatment withdrawn were she found to be pregnant.[12]

The history of living wills in Kentucky began with the Kentucky Court of Appeal's determination that it is permissible for substituted judgment to be used to make decisions for incompetent persons.[13] In *Strunk v. Strunk*, the court was asked to determine whether a kidney could be removed from an incompetent, 28 year-old ward of the state for the benefit of his brother.[14] The court noted that "[t]he right to act for the incompetent in all cases has become recognized in this country as the doctrine of substituted judgment and is broad enough not only to cover property but also to cover all matters touching on the well-being of the ward."[15] Kentucky subsequently enacted

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VA. CODE ANN. §§ 16-30-2 to 16-30-13 (LexisNexis 2011); WYO. STAT. ANN. §§ 35-22-401 to 35-22-416 (2011).

8 *See* ALA. CODE § 22-8A-4(e) (LexisNexis 2006); CONN. GEN. STAT. ANN. § 19a-574 (West 2011); IDAHO CODE ANN. § 39-4510; KAN. STAT. ANN. § 65-28,103 (2002); MICH. COMP. LAWS ANN. § 700.5512(1) (West Supp. 2010); MO. ANN. STAT. § 459.025 (West 2007); S.C. CODE ANN. § 44-77-70 (2002); TEX. HEALTH & SAFETY CODE ANN. § 166.069 (West 2010); UTAH CODE ANN. § 75-2a-123 (LexisNexis Supp. 2009); WASH. REV. CODE § 70.122.030(1)(d) (2008); WIS. STAT. ANN. § 154.03 (West Supp. 2010).

9 *See* ALASKA STAT. § 13.52.055 (2010); ARK. CODE ANN. § 20-17-206(c) (2005); COLO. REV. STAT. § 15-18-104(2) (2010); DEL. CODE ANN. tit. 16, § 2503(j) (2003); GA. CODE ANN. § 31-32-4 (2009); 755 ILL. COMP. STAT. 35/3(c) (West 2007); IOWA CODE ANN. § 144A.6 (West 2005); MONT. CODE ANN. § 50-9-202(c) (2009); NEB. REV. STAT. § 20-408(3) (2007); NEV. REV. STAT. § 449.624(4) (2009); OHIO REV. CODE ANN. § 2133.06(B) (LexisNexis 2007); R.I. GEN. LAWS § 23-4.11-6(c) (2008).

10 *See* KY. REV. STAT. ANN. § 311.629(4) (West 2011); N.H. REV. STAT. ANN. 137-J:10 (LexisNexis Supp. 2010); N.D. CENT. CODE § 23-06.5-09 (2002); 20 PA. CONS. STAT. ANN. § 5471 (West Supp. 2011); S.D. CODIFIED LAWS § 34-12D-10 (1994).

11 *See* ARIZ. REV. STAT. ANN. § 36-3262 (Supp. 2010); FLA. STAT. ANN. § 765.113 (West 2010); MD. CODE ANN., HEALTH-GEN. § 5-603 (LexisNexis 2009); N.J. STAT. ANN. § 26:2H-56 (West 2007); VT. STAT. ANN. tit.18, § 9702 (Supp. 2010).

12 *See* MINN. STAT. ANN. §§ 145C.10(g) (West 2011); OKLA. STAT. ANN. tit. 63, § 3101.4 (West 2010).

13 *See* Strunk v. Strunk, 445 S.W.2d 145, 145 (Ky. 1969).

14 *See id.*

15 *Id.* at 148.

its first Living Will Directive Act in 1990,[16] and in 1993, the Supreme Court of Kentucky analyzed the effect of the Act,[17] holding in *DeGrella v. Elston* that life-sustaining medical treatment could be withdrawn from a patient in a persistent vegetative state in light of the patient's prior statements that she would not have wanted to be kept alive by artificial means.[18] In 1994, a new Living Will Directive Act replaced the 1990 Act.[19] This Act allows an individual to designate a surrogate to make healthcare decisions on the individual's behalf, provides that the individual may give directions for the withholding or withdrawing of life-prolonging treatment, including artificially provided nutrition or hydration, and provides a model form for writing out these directions.[20] The pregnancy exemption provision can be found in the model form and states, "[i]f I have been diagnosed as pregnant and that diagnosis is known to my attending physician, this directive shall have no force or effect during the course of my pregnancy."[21] Although no litigation has been directed at the pregnancy exemption clause itself, in 2004 the Supreme Court of Kentucky, in *Woods v. Commonwealth*, upheld the Kentucky Living Will Directive Act.[22]

The goal of this note is to argue the constitutional infirmity of the pregnancy exemption clause in the Kentucky Living Will Directive Act and similar legislation enacted in other states staying the effect of advance directives in the instance of a pregnant woman. Part I of the note looks at the constitutionality of pregnancy exemptions from the standpoint of the right to refuse unwanted life-sustaining medical treatment under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. Part II analyzes the constitutionality of such provisions from the perspective of a pregnant woman's reproductive rights, arguing that pregnancy exemptions effectively violate these rights as established by *Roe v. Wade* and its progeny.

16 *See* KY. REV. STAT. ANN. § 311.972 (repealed 1994).

17 *See* DeGrella v. Elston, 858 S.W.2d 698, 706–08 (Ky. 1993).

18 *See id.* at 707–10.

19 KY. REV. STAT. ANN. §§ 311.623 to 311.625 (West 2011).

20 *Id.* §§ 311.623, 311.625.

21 *Id.* § 311.625; *see also* KY. REV. STAT. ANN. § 311.629 (West 2010) (providing that notwithstanding the execution of an advance directive, in the instance of a pregnant woman, provision of life sustaining treatment shall be made unless it is determined to a reasonable degree of medical certainty that such procedures will not maintain the female patient in a manner permitting continuing development and live birth of the unborn child, such treatment will be physically harmful to the woman, or such treatment will prolong severe pain which cannot be alleviated by medication).

22 Woods v. Commonwealth, 142 S.W.3d 24, 42 (Ky. 2004).

I. The Right to Refuse Unwanted Medical Treatment/The Right to Die

A. Development of the Right to Refuse Unwanted Medical Treatment

The so–called "right to die" developed from the common law presumption that competent individuals have the right to refuse unwanted medical treatment.[23] State courts have long recognized the right of an individual to decline to partake in unwanted procedures, reasoning "each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life–saving surgery, or other medical treatment."[24] The state courts have often found such a right of refusal in what has been deemed a common law right to be free from unwanted bodily intrusion as well as the common law crimes of assault and battery.[25] Additionally, courts have looked to the common law doctrine of informed consent to support their holdings that a person has the right to refuse medical treatment.[26] In *In re Quinlan*, the landmark "right to die" state case, the Supreme Court of New Jersey expressly found that the "right [to privacy][27] is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions."[28] *In re Quinlan* involved a family's request that the respirator keeping their daughter, Karen, alive be removed so that she could be allowed to die.[29] After finding that a right to privacy encompasses the right to refuse unwanted medical treatment, the court balanced this right against the state's interest in preserving human life, holding that "the

23 *In re* A.C., 573 A.2d 1235, 1243 (D.C. 1990) (en banc) ("[O]ur analysis of this case begins with the tenet common to all medical treatment cases: that any person has the right to make an informed choice, if competent to do so, to accept or forego medical treatment. The doctrine of informed consent, based on this principle and rooted in the concept of bodily integrity, is ingrained in our common law.").

24 Natanson v. Kline, 350 P.2d 1093, 1104 (Kan. 1960).

25 Rasmussen v. Fleming, 741 P.2d 674, 682–83 (Ariz. 1983) (providing that the basis of the right to refuse unwanted medical treatment derived from the common law right to be free from bodily invasion); Bouvia v. Superior Court, 225 Cal. Rptr. 297, 299 (Cal. Ct. App. 1986) (finding that the right to refuse life–sustaining medical treatment derived from the common law right to be free from unwanted intrusion).

26 Stamford Hosp. v. Vega, 674 A.2d 821, 831–32 (Conn. 1996) (stating that the right to refuse unwanted medical treatment is reflected in the common law doctrine of informed consent).

27 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (citation omitted) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.").

28 *In re* Quinlan, 355 A.2d 647, 663 (N.J. 1976).

29 *See id.* at 647.

State's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."[30] In Quinlan's case the court found "the degree of bodily invasion . . . so great and the prognosis so poor . . . that Karen [Quinlan] would have the right to refuse treatment."[31]

The Supreme Court of the United States has also come to recognize an individual's right to refuse unwanted medical treatment. As early as 1891, the Court held in *Union Pacific Railroad Co. v. Botsford* that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others."[32] In the earliest cases recognizing such a right, the Court was primarily faced with the chore of deciding whether or not individuals could be forcibly vaccinated.[33] From these prior decisions, the Court in *Cruzan v. Director, Missouri Department of Health* inferred a "constitutionally protected liberty interest in refusing unwanted medical treatment."[34] The Court determined that under this liberty interest, Cruzan had the right to have unwanted nutrition and hydration removed even if her "life" depended upon it.[35] In a concurring opinion, Justice O'Connor declared "the liberty [interest] guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water."[36] In a pair of companion cases in 1997, the Court reaffirmed its recognition of a patient's constitutional right to refuse or terminate unwanted medical treatment even if it is of a life–saving nature.[37] In *Vacco v. Quill*, Chief Justice Rehnquist, writing for the majority, pronounced "[e]veryone, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment."[38]

As for an incompetent person's right to refuse unwanted medical treatment, the Supreme Court in *Cruzan* assumed, at least for the purposes of that case, that the right to refuse unwanted medical treatment held by a competent person was also held by an incompetent patient.[39] In her

30 *Id.* at 664.

31 Joan Mahoney, *Death with Dignity: Is There an Exception for Pregnant Women?*, 57 UMKC L. REV. 221, 223 (1989) (citing *In Re Quinlan*, 355 A.2d at 664).

32 Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

33 *See* Washington v. Harper, 494 U.S. 210, 229 (1990); Jacobson v. Massachusetts, 197 U.S. 11, 24–30 (1905).

34 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

35 *See id.* at 279.

36 *Id.* at 289 (O'Connor, J., concurring).

37 *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997); Vacco v. Quill, 521 U.S. 793, 807 (1997).

38 *Vacco*, 521 U.S. at 800.

39 *See Cruzan*, 497 U.S. at 280.

concurrence, Justice O'Connor explained "[a] seriously ill or dying patient whose wishes are not honored may feel a captive of the machinery required for life–sustaining treatment or other medical interventions. Such forced treatment may burden that individual's liberty interests as much as any state coercion."[40] This declaration came well after the state courts had discerned such a right for once competent patients.[41]

1. Substantive Due Process and Balancing State Interests.—While in *Cruzan* the Supreme Court recognized that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment[42] under the Due Process clause of the Fourteenth Amendment,[43] and assumed for the purposes of that case that such a right would also apply to incompetent persons who were formerly competent,[44] it also acknowledged that such a right is not absolute.[45] The Court went on to note that "[a]lthough many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, [the Supreme Court has] never so held."[46] In addition to holding that the State of Missouri could require evidence of the incompetent's wishes regarding the withdrawal of treatment be proved by clear and convincing evidence,[47] the Court found that in determining whether a person's constitutional rights had been violated, the individual's liberty interest in withdrawing life–sustaining treatment must be balanced against relevant state interests.[48]

The four state interests generally balanced against an individual's liberty interest include "the preservation of life, the prevention of suicide, the protection of innocent third parties and the maintenance of the ethical integrity of the medical profession."[49] There is further agreement

40 *Id.* at 288 (O'Connor, J., concurring) (citations omitted).

41 *See, e.g.*, *In re* Browning, 568 So. 2d 4, 12 (Fla. 1990) ("[There is] no basis for drawing a constitutional line between the protections afforded to competent persons and incompetent persons."); *In re* Martin, 538 N.W.2d 399, 406 (Mich. 1992) (holding that an incompetent patient has the same right as a competent patient if that person has "made and communicated . . . [their decision to refuse medical treatment] before losing the capacity to make further choices"); *In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976).

42 *Cruzan*, 497 U.S. at 278.

43 U.S. CONST. amend. XIV, § 1.

44 *See In re Quinlan*, 355 A.2d at 664.

45 *See Cruzan*, 497 U.S. at 279 (holding that "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests" (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982) (internal quotation marks omitted))); *id.* at 280 (holding that the Constitution does not forbid a state to require clear and convincing proof of the incompetent's wishes as to the withdrawal of treatment).

46 *Id.* at 279 n.7.

47 *See id.* at 280–81.

48 *Id.* at 279.

49 Hope E. Matchan & Kathryn E. Sheffield, *Adding Constitutional Deprivation to Untimely*

that "in light of the fundamental importance and inviolability of bodily integrity, the state interest must be compelling," in order for a state interest to be found to outweigh an individual's liberty interest in refusing life-sustaining medical treatment.[50] In general, when it comes to a competent individual's[51] informed decision to refuse medical treatment, the four core state interests have to this point, not been found to prevail.[52] Even so, it is a valuable exercise to weigh these four state interests in the context of a pregnant woman who has made the informed decision, via an advance directive, to have life-sustaining treatment withdrawn once she has lost decisional capacity.

a. Sanctity of Life. The Supreme Court has repeatedly held that the state has an "unqualified interest in the preservation of human life."[53] While Chief Justice Rehnquist wrote in *Cruzan*, "[i]t cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment,"[54] the Court went on to hold that in the context of the withdrawal of life-sustaining medical treatment, the state's interest is narrowed to a "more particular interest" in "legitimately seek[ing] to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements."[55] In determining that a formerly competent person may have life-sustaining treatment withdrawn while at the same time allowing a state to require the person's wishes to have such treatment withdrawn be established by clear and convincing evidence, but not allowing the state to completely proscribe such a decision, the Court impliedly held that a state's interest in preserving the life of the individual was not sufficient to overcome a person's right to have life-sustaining treatment withdrawn.[56]

Death: South Dakota's Living Will Pregnancy Provision, 37 S.D. L. REV. 388, 394 (1992) (footnotes omitted); *see* Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327, 343 (1991) ("The asserted state interests may include the integrity and liability of the medical profession, protection of public morals, the interests of third parties (primarily dependant minors) and, the most frequently cited reason, the preservation or sanctity of the life of the patient." (footnotes omitted)).

50 Neff, *supra* note 49, at 343.

51 The Kentucky Living Will Directive Act, like most other advance directive acts, requires that an individual be competent when he or she initially fills out a living will in order for it to be effective. *See* KY. REV. STAT. ANN. §§ 311.623 (West 2011).

52 *See* Janice MacAvoy-Smitzer, Note, *Pregnancy Clauses in Living Will Statutes*, 87 COLUM. L. REV. 1280, 1289 (1987); Neff, *supra* note 49, at 346–47.

53 Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990)) (internal quotation marks omitted).

54 *Cruzan*, 497 U.S. at 281.

55 *Id.*

56 *See id.* (where the Court specifically held that: "The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of

Alternatively, one could argue that the preservation of the patient's life is not implicated when dealing with whether or not an advance directive should be followed, as most acts require that a person be in a "terminal condition" before the directive can be put into effect.[57] State courts have held that the state's interest in life weakens when a patient is in a persistent vegetative state, as medical treatment serves only to prolong the life of an imminently dying person.[58] Justice Stevens, dissenting in *Cruzan*, espouses this proposition in quoting the Supreme Court of Massachusetts:

> When we balance the State's interest in prolonging a patient's life against the rights of the patient to reject such prolongation, we must recognize that the State's interest in life encompasses a broader interest than mere corporeal existence. In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve.[59]

The time at which an advance directive would be implemented is one of those rare instances where the burden of maintaining the corporeal existence degrades the very humanity it was meant to preserve.

An additional issue is whether or not the state, in having an interest in the preservation of human life, also has an interest in the potential life of the fetus carried by the pregnant woman. The Supreme Court has held that an unborn fetus, whether viable or not, does not constitute a person, i.e. a human life.[60] Even so, based on *Roe v. Wade* and *Planned Parenthood*

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heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life–sustaining medical treatment.").

57 *See, e.g.*, ALA. CODE § 22–8A–4(d) (LexisNexis 2006) ("An advance directive for healthcare shall become effective when . . . the declarant has either a terminal illness or injury or is in a state of permanent unconsciousness."); ARK. CODE ANN. § 20–17–203 (2005) ("A declaration becomes operative when . . . (ii) the declarant is determined by the attending physician and another physician in consultation either to be in a terminal condition and no longer able to make decisions regarding administration of life–sustaining treatment or to be permanently unconscious."); CONN. GEN. STAT. ANN. § 19a–571(a) (West 2010) ("[A]ny licensed medical facility who or which withholds . . . a life support system . . . shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for such withholding . . . provided . . . (2) the attending physician deems the patient to be in a terminal condition . . . ."); IOWA CODE ANN. § 144A.3(1) (West 2005 & Supp. 2011) ("The declaration shall be given operative effect only if the declarant's condition is determined to be terminal and the declarant is not able to make treatment decisions.").

58 *See* Rasmussen v. Fleming, 741 P.2d 674, 683 (Ariz. 1987) ("Although the state's interest in preserving life is justifiably strong, we believe this interest necessarily weakens and must yield to the patient's interest where treatment at issue 'serves only to prolong a life inflicted with an incurable condition.'" (quoting *In re* Colyer, 660 P.2d 738, 743 (Wash. 1983) (en banc))).

59 *Cruzan*, 497 U.S. at 345 n.18 (Stevens, J., dissenting) (citing Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 635 (Mass. 1986)).

60 Roe v. Wade, 410 U.S. 113, 158 (1973) (holding that the word "person" as used in the Fourteenth Amendment does not include the unborn).

of Southeastern Pennsylvania v. Casey, it appears the state does have a compelling interest in the potential life of the fetus at least at the point of viability.[61] The issue, then, is whether or not a person's right to refuse a medical procedure[62] can ever be outweighed by the state's interest in potential life. While there has been little case law speaking to this issue specifically, at least one federal court of appeals has taken up the subject. In *In re A.C.*, the District of Columbia Court of Appeals vacated a former decision that required a pregnant woman terminally ill with cancer to undergo a cesarean delivery of her fetus.[63] The court held that a near–death pregnant patient carrying a viable fetus, may, if competent, decide whether or not to have a cesarean delivery and further, if she is found to be incompetent, substituted judgment should be applied in deciding whether to forgo the procedure.[64] The reasoning found in *In re A.C.* suggests that a woman with a legally effective advance directive should be allowed to direct the withdrawal of life–sustaining treatment even if pregnant with a viable fetus, as the state's interest in the potential life of that fetus does not outweigh an individual's right to withdraw that treatment.[65] Although *In re A.C.* was seen "as a giant step forward in the fight to protect women's rights . . . to refuse unwanted invasive medical procedures,"[66] the court also noted that "[w]e do not quite foreclose the possibility that a conflicting state interest may be so compelling that the patient's wishes must yield, but we anticipate that such cases will be extremely rare and truly exceptional."[67] Despite this caveat, the scenario described in *In re A.C.*, suggests that the potential life of the viable fetus would not constitute such a compelling state interest.

b. Prevention of Suicide. The fact that the state holds an interest in preventing suicide has never been more clearly stated than it was in the

61 *See id.* at 164–65 ("[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (confirming the State's power to restrict abortions after fetal viability).

62 This issue will be taken up *infra*.

63 *In re* A.C., 573 A.2d 1235, 1237–38 (D.C.1990) (en banc); *see also In re* Baby Boy Doe, 632 N.E.2d 326, 326 (Ill. App. Ct. 1994) (upholding a patient's right to refuse a cesarean section even though the health of the fetus was endangered as it was receiving an inadequate supply of oxygen).

64 *In re A.C.*, 573 A.2d at 1237.

65 *Id.* at 1252.

66 Amy Lynn Jerdee, *Breaking Through the Silence: Minnesota's Pregnancy Presumption and the Right to Refuse Medical Treatment*, 84 MINN. L. REV. 971, 988 (2000) (alteration in original) (quoting Tracey E. Spruce, *The Sound of Silence: Women's Voices in Medicine and Law*, 7 COLUM. J. GENDER & L. 239, 245 (1998)) (internal quotation marks omitted).

67 *In re A.C.*, 573 A.2d. at 1252.

Supreme Court's holdings in *Washington v. Glucksberg* and *Vacco v. Quill*, companion cases revolving around the issue of whether it is permissible for a state to ban physician–assisted suicide.[68] The Court in *Glucksberg* determined:

> While suicide is no longer prohibited or penalized, the ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions.[69]

This sentiment was reiterated in *Vacco* as the Court noted the state's desire to prevent suicide was among the valid and important public interests which "easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end."[70] Nevertheless, this interest does not seem to be implicated in the instance of enforcement of an advance directive withdrawing life–sustaining treatment. In fact, the Court has specifically distinguished between suicide and withdrawal of life–sustaining treatment.[71] Disagreeing with the respondents' claims that the distinction between refusing lifesaving medical treatment and assisted suicide is "arbitrary" and "irrational," the Court in *Vacco* noted that the Court has recognized "at least implicitly, the distinction between letting a patient die and making that patient die."[72] Drawing on their reasoning in *Cruzan*, the Court held that the distinction is based on the fact that the right to refuse treatment is not grounded on the "proposition that patients have a general and abstract 'right to hasten death,' but on well–established, traditional rights to bodily integrity and freedom from unwanted touching."[73] As such, no support exists for the "notion that refusing life–sustaining medical treatment is 'nothing more nor less than suicide.'"[74]

c. Third Parties. In general, the state's interest in protecting "innocent third parties" refers to situations where minor children are orphaned by the death

68 Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997).

69 *Glucksberg*, 521 U.S. at 729.

70 *Vacco*, 521 U.S. at 809 (listing "prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia" as valid and important public interests easily satisfying "the constitutional requirement that a legislative classification bear a rational relation to some legitimate end").

71 *See id.* at 807–08.

72 *Id.* at 807.

73 *Id.* (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990) (O'Connor, J., concurring) (citation omitted)).

74 *Id.*

of their parent.[75] The question remains whether or not this same concern can be applied to an unborn fetus, which, under the Court's analysis in *Roe v. Wade* does not constitute a human being.[76] Because advance directive acts generally require that a person be in a terminal condition[77] before a directive removing life-sustaining treatment be carried out, it seems as though this state interest is not highly implicated, regardless of whether or not like concern for the upbringing of minor children is shown for unborn fetuses. If the potential parent is "on their last leg," as seems to be the scenario envisioned by most advanced directive statutes,[78] a pregnancy exemption does nothing to keep the child from being orphaned. Some commentators have gone as far as to argue that "[p]regnancy clauses appear to defeat this interest [in preventing minor children from being orphaned] due to the fact that the fetus itself may be orphaned," and that "[i]t follows that the recognition of the unconstitutionality of pregnancy clauses, and therefore their abrogation, would in fact promote this particular state interest."[79] In any event, it seems clear that a pregnancy exemption does not further the protection of innocent third parties, at least as this interest is traditionally understood.

d. Integrity of the Medical Profession. The Supreme Court, in *Washington v. Glucksberg*, held that the state undoubtedly has an interest in protecting the integrity and ethics of the medical profession.[80] When it comes to living wills, again, this interest is not usually implicated as most Acts provide that physicians or health care providers are not subject to civil or criminal liability for giving effect to advance directives.[81] Assuming that the interest is implicated, there does not seem to exist a sufficient relationship between the infringement of a woman's right to have her advance directive carried

75 Matchan & Sheffield, *supra* note 49, at 404; *see also* President & Dirs. of Georgetown Coll., Inc., 331 F.2d 1000, 1008 (D.C. Cir. 1964).

76 *See* Roe v. Wade, 410 U.S. 113, 158 (1973) ("All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

77 *See supra* note 57.

78 *See supra* note 6.

79 Matchan & Sheffield, *supra* note 49, at 404 (footnote omitted).

80 *See* Washington v. Glucksberg, 521 U.S. 702, 731 (1997).

81 *See, e.g.*, CONN. GEN. STAT. ANN. § 19a-571(a) (West 2011) ("[A]ny licensed medical facility who or which withholds . . . a life support system . . . shall not be liable for damages in any civil action or subject to prosecution in any criminal proceeding for such withholding . . . provided . . . (2) the attending physician deems the patient to be in a terminal condition . . . ."); S.D. CODIFIED LAWS § 34-12D-13 (2010) ("A physician or other health-care provider is not subject to civil or criminal liability or to discipline for unprofessional conduct for giving effect to a declaration, absent actual knowledge of its revocation, for determining that a terminal condition does or does not exist or for declining to give effect to a declaration under § 34-12D-11.").

out and the protection of the medical professional's integrity. In *Glucksberg*, the Court held that "[p]hysician–assisted suicide is fundamentally incompatible with the physician's role as healer"[82] and "could . . . undermine the trust that is essential to the doctor–patient relationship by blurring the time–honored line between healing and harming."[83] While Washington's ban on physician–assisted suicide may be seen as rationally related to this state interest,[84] the pregnancy exemption in state advance directive acts does not seem to meet such a minimum rationality test let alone the strict scrutiny test which may be required by *Cruzan*.[85] Although the Court determined that physician–assisted suicide "could . . . undermine the trust that is essential to the doctor–patient relationship,"[86] it does not appear that the withdrawal of life–sustaining treatment itself in any way compromises this trust.[87]

Effectuating a pregnancy exemption could have just the opposite effect of undermining the trust established between a patient and physician. For instance, assume Jane, the female in the introductory anecdote, had created an advance directive in which she specifically noted that she wished to have life–sustaining treatment withdrawn if she were to fall into a persistent vegetative state, regardless of whether or not she were pregnant at the time. Jane, in order to ensure that her wishes are carried out, would likely provide a copy of this advance directive to her physician so that it may be included in her medical file. Jane would also likely verbally express her wishes to her physician, trusting that he or she would ensure that her wishes would be carried out were she to fall into a persistent vegetative state. In a state where a pregnancy exemption exists, as is the case in Kentucky, the trust Jane would have undoubtedly held for her physician to carry out the terms of her directive would be worthless as the physician would be stayed from carrying out Jane's wishes.

An additional concern regarding the integrity of the medical profession

82 *Glucksberg*, 521 U.S. at 731 (alteration in original) (quoting AM. MED. ASS'N, CODE OF ETHICS § 2.211 (1994)).

83 *Id.* (citing *Assisted Suicide in the United States: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 355–56 (1996) (statement of Dr. Leon R. Kass) ("The patient's trust in the doctor's whole–hearted devotion to his best interests will be hard to sustain.")).

84 *See id.* at 735 (holding that Washington's ban on assisted suicide is at least reasonably related to the promotion and protection of the four state rights).

85 *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990) ("But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."); *id.* at 289 (O'Connor, J., concurring).

86 *Glucksberg*, 521 U.S. at 731.

87 *See Cruzan*, 497 U.S. at 265–81 (noting that the Court assumes a constitutionally protected right to refuse lifesaving medical care without mentioning a competing state interest in protecting the integrity of the medical profession).

is implicated when the effect of following an advance directive is the destruction of a potential life. Most of the law discerning whether or not limitations on the destruction of a fetus can ever be held sufficiently related to the state's interest in protecting the integrity of the medical profession to justify infringement on a person's liberty interests is discussed in the context of abortion, which will be discussed *infra*. However, it is sufficient now to note that at least pre–viability, this state interest is not sufficiently implicated to allow for infringement upon a pregnant woman's right to have her advance directive honored.[88]

2. Equal Protection.—The "right to die," in addition to having due process implications, also implicates the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment provides in pertinent part, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[89] While the equal protection guaranteed in the Fourteenth Amendment "does not take from the States all power of classification,"[90] the clause does generally require that the "classifications made by the state bear an adequate relationship to the purposes the classifications are purported to serve."[91] Certain classifications, however, are subjected to a more stringent review than this general test.[92] When the government makes a distinction on the basis of alienage,[93] race,[94] or national origin[95] the Supreme Court has held that strict scrutiny must be applied, requiring the distinction be narrowly tailored to serve a compelling

88 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (recognizing "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State"); Roe v. Wade, 410 U.S. 113, 164 (1973) ("For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."). *But cf.* Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (holding that the Partial–Birth Abortion Act of 2003 which prohibited D&E abortion pre–viability did not constitute an undue burden upon a woman's right to an abortion pre–viability).

89 U.S. CONST. amend. XIV, § 1.

90 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271 (1979) (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976)).

91 Matchan & Sheffield, *supra* note 49, at 396.

92 *See* Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 124 (1989) ("[I]n determining whether a government classification is supported by sufficient justification to satisfy the equal protection clause, one must determine first what kind of means–end scrutiny is applicable and second whether that test is met. Intensified scrutiny is applicable where the classification is suspect (or semi–suspect), or the government has infringed a fundamental right, or the classification is somewhat suspect and the interest is somewhat fundamental. Otherwise rationality review applies.").

93 Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

94 Korematsu v. United States, 323 U.S. 214, 216 (1944).

95 *See* Oyama v. California, 332 U.S. 633, 646 (1948).

government interest using the least restrictive means.[96] Strict scrutiny thus, is a test which "has been satisfied only once in an equal protection case reviewed by the Supreme Court."[97] Additionally, an "intermediate scrutiny" test is to be applied to distinctions based upon illegitimacy and gender.[98] Intermediate scrutiny holds that such distinctions will be found to violate the Equal Protection Clause unless the distinction is substantially related to an important government interest.[99] Classifications that are not "suspect" or related to sex or illegitimacy are to be judged under a minimum rationality test, which requires that the distinction only be rationally related to a legitimate public interest.[100] Undoubtedly, Equal Protection challenges are won and lost based on the classification of the distinction made.

a. Why Pregnancy Exemptions Constitute a Distinction Based on Sex. In order to determine whether or not a pregnancy exemption clause of an advance directive act violates the Equal Protection Clause, it must first be determined which of the three tests enunciated above will be applied to the distinction made. As pregnancy exemptions would only apply to women, it is clear that either a minimum rationality test would apply (if it is determined that the classification made is non–suspect) or intermediate scrutiny if the distinction is held to be based on gender. While it is possible to argue that the distinction made between pregnant and non–pregnant people in pregnancy exemption clauses is not rationally related to a legitimate public interest,[101] the Supreme Court has rarely held that this test is not satisfied, with the state generally coming out as the winner.[102] As

96 *See* Palamore v. Sidoti, 466 U.S. 429, 432–33 (1984).

97 Katherine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1538 (1974) (citing *Korematsu*, 323 U.S. at 214 (holding that national security interests justified federal internment of Japanese during World War II)).

98 Matchan & Sheffield, *supra* note 49, at 396–97.

99 *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (noting that, in order to meet the burden of intermediate scrutiny, the party seeking to uphold a statute must show an "exceedingly persuasive justification"); Califano v. Goldfarb, 430 U.S. 199, 211–12 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* Galloway, *supra* note 92, at 125.

100 *See* Romer v. Evans, 517 U.S. 620, 621 (1996) ("We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

101 *See supra* notes 43–76 and accompanying text.

102 *But cf. Romer*, 517 U.S. at 633 (holding that a state constitutional amendment which precluded all legislative, executive, or judicial action designed to protect the status of persons based on homosexuals, lesbian or bisexual orientation, conduct, practice or relationships failed the minimum rationality test). It may be argued, however, that the pregnancy exemption fails even minimum rationality with respect to the government interest in the potential life of the fetus, at least pre–viability. *See* Roe v. Wade, 410 U.S. 113, 163 ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.").

such, in order for the pregnancy exemption to be deemed unconstitutional under the Equal Protection Clause, a distinction based on pregnancy would need to be deemed a classification based on sex and intermediate scrutiny applied.

The consensus among legal scholars is that distinctions based on pregnancy constitute gender classifications:[103]

> Pregnancy's centrality to human reproduction, and hence to women's traditional role, has made it the basis for rules which express and reinforce old ideologies about women's proper place. The tangible, physical nature and high visibility of pregnancy have made such rules seem natural and appropriate, but upon close examination, the rules are often only tenuously related to their purposes and are premised on the very 'old notions' about women that the Supreme Court has ruled will not justify sex-based legislation.[104]

It is argued that a distinction based upon pregnancy divides individuals into two groups, one containing those who cannot become pregnant, men, and the other including those who can, women.[105] In her 1989 article *Death with Dignity: Is There an Exception for Pregnant Women?*, Joan Mahoney presented an analogy which clearly illustrates why pregnancy-based distinctions are in fact classifications based on sex:

> Suppose, for example, that a man has a young son who has developed leukemia, and that the only possibility of keeping the son alive is to provide him with a bone marrow transplant from an appropriate relative. After tests reveal that the father is the only relative whose bone marrow would save the boy, but before the father can decide whether he wants to make the donation, the father suffers a cerebral hemorrhage that leaves him in a persistent vegetative state. The father has left a living will, making clear his intent to refuse medical treatment in that situation, and his wife, wishing to carry out his intent, has requested the hospital to cease all life sustaining treatment. Although the wife also is concerned with the health of her child, she may have faith that he will pull through even without the transplant, and she does not want to violate the husband's bodily rights. Suppose, in addition, that the doctors determine that the boy is at the wrong stage of treatment for a transplant, and they seek a court order that would allow them to keep the father alive over a period of several months and then to extract his bone marrow and transplant it to the son before the father is allowed to die. They might even ask that the father be maintained artificially for

103 *See* Matchan & Sheffield, *supra* note 49, at 401; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §16-29 (2d ed. 1988); Bartlett, *supra* note 97, at 1557; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 379 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 n.107, 988 (1984).

104 Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 358 (1985).

105 Matchan & Sheffield, *supra* note 49, at 401.

> some period after the transplant, in case it does not work, so he could provide more bone marrow for a second attempt.[106]

"[N]o court," Mahoney explained, "has [ever] ordered a competent adult to donate an organ, or even bone marrow, to save the life fo [sic] another person, even his or her child."[107] Further, based on the Supreme Court's holding in *Cruzan* it would seem as though the man would have a constitutional right to have his living will carried out as the state's interest in protecting his son, a third party, would not override his right to refuse unwanted medical treatment.[108] The query then, is how does this situation differ from a pregnant woman in persistent vegetative state who has executed a valid advance directive prior to coming to lack decisional capacity? If there is no real distinction, as Mahoney believes there is not,[109] then the distinction drawn is based upon sex.

b. The Effect of *Geduldig v. Aiello*. The Supreme Court's holding in *Geduldig v. Aiello*[110] presents a potential roadblock to a holding that a distinction based upon pregnancy constitutes gender classification. In *Geduldig*, the Court held that a California disability insurance program's exclusion of pregnancy and childbirth from coverage did not constitute a distinction based upon sex but instead simply "divide[d] potential recipients into two groups–pregnant woman and nonpregnant persons."[111] After finding that the distinction made was not gender–based, the court applied minimum rationality and found that the insurance scheme did not violate the Equal Protection Clause, as the state of California had "legitimate interests in maintaining the self–supporting nature of its insurance program, distributing available resources to keep benefit payments at adequate levels for disabilities covered rather than to cover all disabilities, and maintaining the contribution rate at nonburdensome levels"[112] and that these interests provided an "objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program

106 Mahoney, *supra* note 31, at 230.

107 *Id.*; *see also In re* Pescinski, 226 N.W.2d. 180, 180 (Wis. 1975). *But see* Strunk v. Strunk, 445 S.W.2d 145, 145 (Ky. 1969) (approving organ donation by a mentally handicapped man based on the court's finding that the donor was very close and dependent upon the donee, his brother, and he would thus benefit from the brother's survival).

108 *See supra* notes 43–56 and accompanying text.

109 Mahoney, *supra* note 31, at 231 ("In fact, the very idea of maintaining a body in a 'living' state so as to use it for organ transplants is offensive, yet I fail to see the difference between that and the requirement in living will statutes that pregnant women be kept alive so that the fetus can be brought to term and delivered.").

110 Geduldig v. Aiello, 417 U.S. 484 (1974).

111 *Id.* at 496 n.20.

112 Matchan & Sheffield, *supra* note 49, at 400.

than it has."[113]

Geduldig, however, has been functionally overruled by *Newport News Shipbuilding & Drydock Co. v. E.E.O.C.*[114] and *U.A.W. v. Johnson Controls Inc.*[115] In *Newport News*, a Title VII case, the Court determined that the Pregnancy Discrimination Act "rejected the test of discrimination employed by the Court" in *General Electric v. Gilbert*,[116] a test which the Court recognized in *Geduldig*.[117] The Court further pointed out Justice Brennan's and Justice Stevens' disdain for the *Gilbert* holding, as they noted that the appropriate distinction was "between persons who face a risk of pregnancy and those who do not."[118] Further, in *U.A.W. v. Johnson Controls Inc.*, the Court determined that a policy excluding female employees from certain jobs in an effort to protect fetuses constituted a distinction based on gender.[119] In his majority opinion, Justice Blackmun noted, "the pregnancy distinction 'classifie[s] on the basis of gender and childbearing capacity.'"[120] Justice Blackmun's conclusion thus "connected childbearing capacity with gender," providing "the strongest evidence that *Geduldig* has been overruled."[121]

c. Application of Intermediate Scrutiny. Once it is determined that the pregnancy exemption constitutes a distinction based on sex, intermediate scrutiny is to be applied to determine whether such an exemption would violate the Equal Protection Clause.[122] In order to be found constitutional, the exemption must be substantially related to an important government interest.[123] As noted, there are a number of state interests implicated in a person's decision to withdraw life-sustaining treatment.[124] The first question is whether or not those interests are sufficiently "important interests." Although these interests have never been held sufficiently important to prevent a male from having life-sustaining treatment withdrawn, it may be assumed that based upon the Supreme Court's analysis in *Roe v. Wade* and its progeny, at some point the state's interest in the potential life of a fetus

113 *Geduldig*, 417 U.S. at 496.

114 Newport News Shipping & Dry Dock Co. v. Equal Opportunity Emp't Comm'n, 462 U.S. 669 (1983).

115 UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

116 *Newport News Shipping & Dry Dock Co.*, 462 U.S. at 676.

117 *Id.* at 676–77.

118 *Id.* at 678.

119 *See UAW*, 499 U.S. at 211.

120 Stephanie S. Gold, Note, *An Equality Approach to Wrongful Birth Statutes*, 65 FORDHAM L. REV. 1005, 1026 (1996) (citing *UAW*, 499 U.S. at 198).

121 *Id.*(footnotes omitted).

122 *See supra* notes 78–79 and accompanying text.

123 *See supra* note 79 and accompanying text.

124 *See supra* notes 43–76 and accompanying text.

may become not only substantially important but even compelling.[125] As such, if ever presented with a pregnancy exemption clause, the Court may likely find a sufficiently important government interest in the life of the fetus, at least after the point of viability.[126]

The central determination is thus whether or not the exemption is sufficiently related to this important government interest. In his article *Basic Equal Protection Analysis*,[127] Russell Galloway, Jr. notes, "[t]he substantial relation test has been called 'opaque' and has caused confusion and dispute, but it now appears to be settled that it requires that the classification be substantially effective and necessary."[128] One may in fact put forth a compelling argument that a pregnancy exemption would be substantially effective and even necessary to save the life of a fetus. The problem, however, is that such an exemption sweeps too broadly, as it encompasses all stages of pregnancy, including points prior to viability of the fetus. According to the Supreme Court's abortion framework as laid out in *Casey* and *Roe*, the state does not have a sufficient interest in the potential life of the fetus, at least pre–viability, such that the provision may pass under intermediate scrutiny.[129] Even more concerning is the fact that even if it is determined the state has a sufficiently important interest in the life of a potential fetus, to which the pregnancy exemption is substantially related, no Court has ever determined that such a situation warrants ordering that a male patient's advance directive be ignored in order to serve the very same interest in life.[130] Two options seem to exist: either the Court must hold that a male patient's advance directive may also be ignored in order to protect the life of another, a decision which seems to oppose cases such as *Cruzan* which declare a person has a constitutional right to forgo life–sustaining medical treatment,[131] or that the gender distinction made with pregnancy exemptions are not sufficiently substantially related to preserving the potential life of a fetus.

125 *See* Roe v. Wade, 410 U.S. 113, 163 (1973) (stating that, with respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 834 (1992) (reaffirming Roe's holding that recognized "a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose pre–viability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure").

126 *See Roe*, 410 U.S. at 163; *Casey*, 505 U.S. at 834.

127 Galloway, *supra* note 92, at 121.

128 *Id.* at 143–44 (footnote omitted).

129 *See supra* note 123.

130 *See supra* note 96.

131 *See supra* notes 40–47 and accompanying text.

II. Reproductive Rights

A. *The Current State of the Law Under* Roe, Casey, *and* Gonzalez

Also implicated in pregnancy exemptions to advance directive acts are a women's reproductive rights. By prohibiting the execution of a valid advance directive withdrawing life-sustaining medical treatment in the instance of a pregnant woman, states that have enacted advance directive acts with pregnancy exemptions essentially proscribe a formerly competent woman's ability to abort her fetus. The right to reproduce, or rather not to reproduce, finds its roots to some extent in the right to privacy found in the "penumbras and emanations" of the Bill of Rights.[132] The Supreme Court in *Griswold v. Connecticut*, through its invalidation of a Connecticut statute's prohibition on the use of contraceptives by a married couple, recognized this right to privacy,[133] which was further extended to non-married couples in *Eisenstadt v. Baird*.[134] This right to privacy was next found broad enough to include a woman's decision to terminate her pregnancy in *Roe v. Wade*.[135] Although the right to privacy was found to be a fundamental right[136] in *Roe* and its predecessors, the Court held in *Roe* that, like all other fundamental rights, this right must be balanced against state interests, and only when an infringement of such fundamental rights is found to be necessary and narrowly tailored to serve a compelling government interest will it be found constitutional.[137] The Court in *Roe* held that post-viability of a fetus, a state may completely proscribe abortion except where it is necessary "in appropriate medical judgment, for the preservation of the life or health of the mother."[138] This essentially amounted to holding that post-viability, the state's interests become sufficiently compelling to warrant complete infringement on a woman's right to abortion. Pre-viability, the state's interests were found not to be sufficiently compelling. Prior to the end of the first trimester the abortion decision should be left entirely up to the pregnant woman and her attending physician,[139] and "subsequent to approximately the end of the first trimester, the State, in promoting its

132 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Further, the right to privacy is grounded in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969) (right to private possession of obscene matter), the Fourth Amendment, Terry v. Ohio, 392 U.S. 1, 9 (1968) (right to walk down the street undisturbed), and the due process clause of the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right to teach one's children).

133 *Griswold*, 381 U.S. at 484, 494–95.

134 Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

135 Roe v. Wade, 410 U.S. 113 (1972).

136 *Id.* at 152.

137 *Id.* at 155 n.11.

138 *Id.* at 165.

139 *See id.* at 164.

interest in the health of the mother, may, if it chooses, [only] regulate the abortion procedure in ways that are reasonably related to maternal health."[140]

The rule in *Roe* was altered slightly by a plurality holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[141] where the Court did away with *Roe's* trimester framework and held that although a woman has the right to terminate her pregnancy pre–viability, the state, with its "concurrent interest" in the potentiality of life, may implement measures "designed to ensure that the woman's choice is informed, so long as these measures do not pose an undue burden on her right."[142] Post–viability, the rule remains that the state may completely proscribe abortion, except where necessary to promote the life or health of the mother.[143] *Casey* provides some guidance as to what exactly would constitute an undue burden, or "substantial obstacle,"[144] by invalidating a provision of the Pennsylvania Abortion Control Act of 1982, which required spousal notification prior to the performance of an abortion procedure.[145] Conversely, the Court's 2007 decision in *Gonzales v. Carhart*, concerning the Partial–Birth Abortion Act of 2003, provides an illustration of what does not constitute such a substantial burden.[146] The Act, which banned intact D & E abortion[147] without an exception for the life and health of the pregnant woman, was held not to constitute an undue burden on a woman's pre–viability right to obtain an abortion.[148]

B. Applying the Current Framework

In order to determine whether or not pregnancy exemption clauses

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140 *Id.*

141 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845 (1992).

142 Alexis Gregorian, *Post–Mortem Pregnancy: A Proposed Methodology for the Resolution of Conflicts Over Whether a Brain Dead Pregnant Woman Should be Maintained on Life–Sustaining* Treatment, 19 ANNALS HEALTH L. 401, 416 (2010) (citing *Casey*, 505 U.S. at 878).

143 *See Casey*, 505 U.S. at 879 (affirming *Roe*, 410 U.S. at 164–65).

144 *Id.* at 877.

145 *See id.* at 893–95.

146 *See* Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

147 The Court in Gonzales describes intact D & E abortion as follows:

> Intact D & E, like regular D & E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. To achieve intact extraction some doctors thus may attempt to dilate the cervix to a greater degree. This approach has been called "serial" dilation. Doctors who attempt at the outset to perform intact D & E may dilate for two full days or use up to 25 osmotic dilators. In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart.

Id. at 137 (citations omitted).

148 *Id.* at 167–68.

present in many state advance directive acts are constitutionally permissible under the Supreme Court's abortion framework, it is necessary to first determine whether or not the exemptions constitute an "undue burden" on a woman's right to abort her fetus pre–viability.[149] In addition, an analysis of the exemptions should be made in the context of a viable fetus. As the Court has consistently held, a state's interest in preserving the potential life of the fetus is sufficiently compelling to outweigh a pregnant woman's right to abort a fetus post–viability. This post-viability analysis thus hinges on a determination of whether the state interest continues to be sufficiently compelling in the context of pregnancy exemptions and end of life decision–making.

1. *Pre–Viability.*—Pre–viability, a state may not completely proscribe a woman's decision to obtain an abortion, and any regulations imposed must not constitute an undue burden to the decision.[150] This undue burden test consists of determining whether or not the regulation imposed constitutes a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[151] In contrast, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."[152] The spousal notification provision invalidated in *Casey* is a clear illustration of what does constitute an undue burden, while the prohibition of a certain form of abortion pre–viability as found in *Gonzales v. Carhart*[153] serves as a clear illustration of a state regulation that does not constitute a substantial obstacle in the path of a woman obtaining an abortion. The problem with pregnancy exemption clauses is that, instead of placing specifications or regulations upon a woman's right to abort her fetus pre–viability, the exemption completely prohibits a woman from exercising her right to abortion no matter what stage of viability the fetus is in when the advance directive is to become effective. Unlike *Carhart*, where the Act at issue prohibited a certain type of abortion, but spoke to no other abortion options,[154] pregnancy exemption clauses completely proscribe a formerly competent person's wish to withdraw life–sustaining medical treatment, which would lead to abortion of the fetus.[155] Thus, at least at points prior to

149 *See supra* notes 139–40 and accompanying text.

150 *See id.*

151 *Casey*, 505 U.S. at 877.

152 *Id.*

153 *See supra* notes 129–30 and accompanying text.

154 *See* Gonzales v. Carhart, 550 U.S. 124, 132 (2007).

155 *See* ALA. CODE § 22–8A–4(e) (LexisNexis 2006) ("The advance directive for health care of a declarant who is known by the attending physician to be pregnant should have no effect during the course of the declarant's pregnancy."); KY. REV. STAT. ANN. § 311.625 (West

the viability of the fetus, pregnancy exemptions seem to unduly burden a woman's right to an abortion under the framework provided by the Court in *Roe*, *Casey*, and *Carhart*. As such, these statutes are unconstitutional as applied to a pregnant woman, pre–viability.

2. *Post–Viability.*—Within the Supreme Court's abortion framework, the Court has consistently held that post–viability of a fetus, the state's interest in potential life is sufficiently compelling to justify complete prohibition of abortion procedures.[156] This would seem to completely preclude any finding that pregnancy exemption clauses are unconstitutional as applied to a pregnant woman's right to terminate her pregnancy post–viability. It should be noted, however, that thus far every abortion case before the Supreme Court has dealt with weighing a woman's right to privacy against the state's interest in the potential life of a fetus in the context of a presumably healthy woman.[157] Yet to be determined by the Court is just how compelling the state's interest in the potential life of a fetus is in the context of a dying woman.

According to the New Jersey Supreme Court, "the State's interest Contra weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest."[158] As one commentator has put it, "[t]here is little doubt that keeping an incompetent woman alive against her will is an invasive procedure when her prognosis is dim,"[159] a circumstance required by most advance directive statutes[160] before a person's wishes will be enforced.[161] Further, in the context of abortion analysis, the state's interest in the potential life of the fetus is generally weighed only against the pregnant woman's abortion rights. In the context of a pregnant woman who has drafted an otherwise valid advance directive indicating that life–sustaining medical treatment be withdrawn, the right to refuse such unwanted medical treatment and the right to die are also implicated. Logically, how compelling a state's interest is in the potential life would seem to lessen as other fundamental rights weighing against this interest also became implicated. In the context of a dying pregnant woman, it is no longer a simple question of whether

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2011) ("If I have been diagnosed as pregnant and that diagnosis is known to my attending physician, this directive shall have no force or effect during the course of my pregnancy."); S.C. CODE ANN. § 44–77–70 (2002) ("If a declarant has been diagnosed as pregnant, the Declaration is not effective during the course of the declarant's pregnancy.").

156 *See supra* notes 131–45 and accompanying text.

157 *See id.*

158 *In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976).

159 Burch, *supra* note 5, at 547.

160 *See supra* note 57.

161 *See id.*

the state's interest in potential life outweighs a woman's privacy right to abortion alone, but also her right to withdraw life-sustaining medical treatment.

While the Supreme Court has not specifically balanced a person's right to refuse life-sustaining medical treatment against the state's interest in potential life, the Federal Court of Appeals for the District of Columbia has done so in *In re A.C.*[162] As previously noted, the Court of Appeals held that a state's interest in the potential life of a fetus was not sufficiently compelling to override a competent patient's decision to forego a certain medical procedure.[163] Although the court in *In re A.C.* also noted that it did not "quite foreclose the possibility that a conflicting state interest may be so compelling that the patient's wishes must yield,"[164] a scenario where a pregnant woman has sought to withdraw life-sustaining medical treatment through an advance directive would not seem to constitute such a situation. A terminally ill pregnant woman who had previously written out her wishes in an advance directive would not be different in any material respect from the woman at issue in *In re A.C.*, who had only days to live when it was determined that she would not have wanted a specific medical treatment administered.[165]

CONCLUSION

Pregnancy exemption clauses similar to the one found in the Kentucky Living Will Directive Act violate the Constitution on two fronts. First, such exemptions, in staying a competent individual's right to refuse unwanted medical treatment, violate a person's right under the Due Process Clause of the Fourteenth Amendment to forego unwanted medical procedures. As well, the exemptions, in distinguishing between those who can bear children (women) and those who cannot (mostly men), contravene the Equal Protection Clause of the Fourteenth Amendment. Because such distinction is not substantially related to an important government interest, it fails intermediate scrutiny. As a result, it is unconstitutional.

Pregnant women's reproductive rights are also infringed by pregnancy exemption clauses. The exemptions certainly constitute an undue burden on a woman's right to procure an abortion pre-viability by completely eliminating the possibility of obtaining the procedure. Additionally, post-viability, the government's interest in protecting the potential life of the fetus is not sufficiently compelling to override a woman's right to refuse unwanted medical treatment. Even if the state's interest in the potential life of the fetus is found sufficiently compelling, it remains to

162 *See supra* notes 49–55.

163 *Id.*

164 *In re* A.C., 573 A.2d.1235, 1252 (D.C. 1990) (en banc).

165 *See id.* at 1237.

be determined why the same restrictions are not imposed on the advance directives of males, if doing so would allow the life of another person to be preserved. Certainly, if the constitutionality of pregnancy exemption clauses in advance directive acts is ever challenged before Kentucky courts, there exists a strong argument that such clauses violate due process, equal protection, and the reproductive rights of women.